**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 874 OF 2002**

Ramajan Khajabhai Shaikh & anr. .... appellants

versus

The State of Maharashtra ... Respondent.

Shri Ujwal R. Agandsurve for the appellants
Smt. V.R.Bhosale APP for the State.

**CORAM; V.G. PALSHIKAR Acg.C.J.&**
**SMT.NISHITA MHATRE,J.**

**DATED; 16TH AUGUST, 2006.**

**JUDGMENT: (Per Palshikar J.)**

1. Being aggrieved by the judgment and order dated 5th June 2002 passed by the III Addl.Sessions Judge, Solapur in Sessions trial No. 211 of 2000, the appellants named above have preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. The prosecution story stated briefly is that the complainant Raju Ramchandra Sutar and deceased Shrishail Teli were friends. According to the complainant Raju, accused had ill design about complainant's wife and therefore he wanted him to be admonished. He accordingly visited the house and they

had verbal exchange. Thereafter on 18th July 2000 around 2.30 p.m. accused Prakash Manurkar went to the father of the complainant and asked him to control his sons or else he (the accused) would kill them. Latter the complainant came to know about this threat to his father and he therefore went to accost accused in this connection. He was accompanied by the deceased. They were on the way to find the accused and when he came and confronted them, gave a challenge to do whatever they can do, to the accused. Complainant replied that he did not want any such thing to be done but desired peaceful behaviour from the accused. According to the prosecution, this erked the accused, who hipped a country-made pistol from his pocket and shot the deceased in his thigh. When the victim went out to see as to what has happened, other accused gave a knife blow on the back of the victim, because of which he collapsed and was later on found dead. The investigation was carried out on the complaint of the complainant, accused persons were arrested and on completion of the investigation, they were charged under section 302 read with 34 of IPC and u/sec. 27 of the Arms Act.

3. The prosecution has examined 12 witnesses and on consideration of their testimony as also other oral and documentary evidence on record, the learned III Addl.

Sessions Judge, Solapur came to the conclusion that the accused were guilty of the offence of murder and accordingly convicted them to suffer imprisonment for life.

4. This order of conviction is assailed by the learned counsel appearing on behalf of the appellants on several grounds. The main contention raised by the learned counsel is that the prosecution story is improbable and therefore appears to be concocted and is liable to be rejected. According to him such petty quarrel, assuming that it did take place, cannot give raise to murder. Eye witness account also is not believable and therefore the trial Judge committed an error in convicting the accused persons under section 302 of IPC and in the alternative the learned advocate submitted that even if the entire findings recorded by the learned trial Judge are accepted, conviction under section 302 IPC is not possible. According to the prosecution, the accused shot the deceased in the thigh and was stabbed in the back by other accused. This action itself speaks to the fact that none of them have the intention to kill him and therefore the conviction is liable to be set aside.

5. With the assistance of the learned counsel appearing on behalf of the accused and the learned APP,

we have scrutinised the record, reappreciated the evidence on record. The complaint is examined as P.w.3, who is also an eye witness. He has deposed very clearly how quarrel arose and how it ended in the accused assaulting the victim. He has described the manner in which the assault was effected. He has described how the injury was caused. His disclosure in the court is natural, his presence at the scene of offence was obvious. It was his wife who was being teased by the accused and therefore his testimony cannot be doubted, either because of his relationship or because of his presence at the scene of offence.

6. There is also on record the recovery of the weapon of offence used by the accused persons and the description of the weapon as disclosed by the seizure panchanama is corroborative of the description given by the complainant P.w.3 before the court. There is thus ample corroborative evidence on record. It is not a case of sole eye witness who is interested in the result of the prosecution.

7. P.w.8 Dr. Manohar More conducted the post mortem and it is the post mortem notes Exh.39 states the injury found on the person of the deceased which describes as ante mortem injuries and the description of those injuries matches with the description of

assault as given by P.w.3 eye witness. It will be seen therefore that the oral testimony of P.w.3 complainant is corroborated not only by recovery of offending weapon but also by independent testimony of Dr. More P.w.8 whose report also corroborates the description of injury as given by the witness. The prosecution has also proved the recovery of the weapon and recovery panchanama which also was duly proved. Taking into consideration all these aspects, in our opinion, the conclusion of the trial Judge that the accused were guilty of assaulting the victim, cannot be faulted with. The learned Judge has correctly marshalled the facts on record and has properly relied on the corroborative facts and circumstances as existing on record for coming to this conclusion.

8. However, we are inclined to accept the second submission of the learned counsel for the appellants that offence u/sec. 302 IPC is not applicable. The learned trial Judge has lost sight on two vital circumstances proved on record. The first is that country-made pistol was used for shooting the victim in the thigh. Had the intention being to kill him, nothing prevented them from shooting him around the heart. The first assault by knife was on the cheek of the accused and then he was stabbed on the back. From the entire description of the assault as given by

P.w.3, it is clear that the accused were on enimical terms towards the complainant and the victim and had challenged them during the alteration of words, wanted to demonstrate their superiority and therefore wiped out the gun and shot him in the thigh or hit the victim on the face by the knife. Their action was deliberate and yet it was not an action intended to cause death. They wanted to show their superiority strength to the victim and the complainant and therefore the gun was used in the manner it was used. There is also no motive strong enough to prompt the accused in taking a drastic step of intentionally killing the victim.

9. It is obviously a case of culpable homicide not amounting to murder. The accused knew that the manner in which they were assaulted, the assault is likely to result in death of the victim. The learned trial Judge should have noted this aspect and convict them under section 304-II IPC. In our opinion, the impugned order therefore requires that much correction. The result therefore, is appeal partly succeeds and is partly allowed. The conviction and sentence u/sec. 302 IPC is set aside. Instead the accused are convicted u/sec. 304-II IPC. They are in jail since 27th July 2000 and have thus undergone more than six years imprisonment. In our opinion, interest of Justice would be met if they are sentenced to suffer R.I. for six years. That

period being completed, they are entitled to be released from jail if they are not required in any other case. Appeal accordingly disposed of.

xxxx